Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

ROGER MERLE; GREEN PARTY STATE COMMITTEE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRUCE I. AFRAN
LAW OFFICE OF BRUCE I. AFRAN
Attorney for Petitioners
10 Braeburn Drive
Princeton, NJ 08540
(609) 924-2075

184967

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The Hatch Act[1] prohibits all of the nearly five million federal employees from seeking any "partisan" elective office. For more than 60 years the Hatch Act has barred these American citizens from playing a full and normal part in our national civic life. While "technically" permitted to run for such offices, federal employees face a nearly insurmountable barrier to running in the form of the Hatch Act's requirement that they resign their employment before declaring their candidacy or face almost certain termination and loss of benefits. A climate of fear pervades federal employees, virtually none of whom will avail themselves of their constitutional rights. The Act imposes an absolute prohibition on the rights of federal workers regardless of their lack of policymaking authority, civil service grade or job responsibility. The Act is so overbroad that it does not even permit the employee to take a leave of absence while running for office. As applied to congressional candidacies, the Hatch Act effectively imposes an extra-constitutional qualification of non-federal employment for congressional candidates in addition to three requirements of age, citizenship, and residency, stipulated in the Constitution, Art. I, Sec. 2, cl.2, also known as the Qualifications Clause. The Hatch Act as applied to congressional candidacies appears to be in conflict with the Qualifications Clause and, more broadly, burdens substantially the free speech and association rights of federal employees.

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1. 5 U.S.C. § 7323(a)(3).

Question presented is whether the Hatch Act as applied to congressional candidacies illegally imposes a fourth qualification for eligibility to Congress in violation of the Qualifications Clause, U.S. Const. Art. I, Sec. 2, cl.2.

Question presented is whether the Hatch Act should be construed to exclude federal candidacies from the Act's ban on seeking partisan elective office.

Question presented is whether the Hatch Act is unconstitutionally overbroad by prohibiting candidacies of all federal employees regardless of grade of employment, job function or job responsibility.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Green Party State Committee, Inc. states that it has no corporate parents and that it has no publicly traded stock.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Irenas, D.J.) dismissing the complaint and granting respondent's motion to dismiss (Appendix ("Pet. App. 10a-14a") is published at 217 F. Supp. 2d 560 (D.N.J. 2002). The court of appeals' opinion (per Ambro, C.J., joined by Sloviter, C.J. and Tucker, D.J. sitting by designation) affirming is annexed at Pet. App. 1a-9a.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on September 30, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Hatch Act, 5 U.S.C. § 7323(a)(3) relevant to this petition are reprinted in the Appendix at 15a.

STATEMENT OF THE CASE

Petitioner Roger Merle ("Merle") is a rural letter carrier employed by the U.S. Postal Service. In 2000, he was nominated as a candidate for United States Representative in New Jersey's Second Congressional District by the Green Party. Petitioner Green Party State Committee, Inc. ("Green Party") is the executive authority of the Green Party of New

Jersey which nominated Merle. Merle qualified for the ballot under state law but, fearing loss of his job with the postal service under the Hatch Act's punitive provisions for candidacies by federal employees, he sought a declaratory judgment from the district court that the Hatch Act impermissibly expands upon the Qualifications Clause, U.S. Constitution, Art. I, Sec. 2, cl.2, by imposing a fourth qualification of *non*-federal employment for election to the House of Representatives. The district court denied Merle's application, holding that the Hatch Act's prohibition on candidacies by federal employees did not impermissibly expand the Qualifications Clause since it did not actually prohibit candidacies by federal employees but merely provided for punishment of such candidacies by termination or otherwise.[2] Termination is mandatory for employees who violate the law. 5 U.S.C. § 7326. Employees who do campaign for partisan office have been repeatedly terminated. *See, e.g., Kane v. Merit System Protection Board*, 210 F.3d 1379 (Fed. Cir. 2000). Presumably because Merle sought relief in court and did not actively campaign after losing his application Merle was not disciplined by the Postal Service or the Civil Service Commission. The Third Circuit affirmed on substantially the same grounds as the district court.

The court of appeals' holding merits this Court's review because it concerns a fundamental structural element of the Constitution, namely the conditions under which citizens may seek election to the national legislature and the extent to

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2. The district court also held that it could not address Merle's claims that the Hatch Act violated his speech and associational rights under the first amendment by virtue of this Court's prior decisions in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

which federal employees may face retribution for this exercise of their political and civil rights. Because of the restrictive provisions of the Hatch Act, in particular the likelihood of termination from employment of an employee who runs for Congress, *Kane*, *supra*, few challenges to the statute are made. The instant petition presents a rare and (probably non-recurring opportunity) for the Court to address the whether the Hatch Act impermissibly burdens the political rights of these nearly five million American citizens. As one commentator has noted, "The public employee under this law lives by fear. It is so threatening that most anyone can inflict penalties on the employee if the occasion presents itself." Eccles, *The Hatch Act and the American Bureaucracy*, Vantage Press (1st ed. 1981). Due to such pervasive fear of the Act, it is not likely that this Court will soon have another opportunity to consider these fundamental questions, a factor which should weigh in favor of certiorari.

In addition, there appears to be a conflict among the circuits as to whether the prohibition on candidacies comprises an *additional* qualification for election to Congress beyond those provided for in the Qualifications Clause. This court has never before considered whether the Hatch Act impermissibly expands upon the Qualifications Clause. The right to seek election to Congress is undeniably fundamental and integral to the federal system; the growth of third parties with their increased opportunity for political candidacies renders this a matter of substantial national interest in that greater numbers of citizens will have the opportunity to seek election to Congress on the increased party lines created by emerging third parties such as the Green Party. Petitioner Merle is merely a harbinger of the future.

1. Merle's application to the district court raised principally the question of whether the Hatch Act expands impermissibly upon the three qualifications for election to Congress contained in the Qualifications Clause: citizenship, age and residence. Merle asserted that the prohibition on candidacies by federal workers amounts effectively to a *fourth* qualification of *non-federal employment* for election to Congress. The provision for termination of any employee who seeks elective office imposes an effective barrier to the ballot for federal employees in that it will likely cause the employee to lose his position, his rank in the civil service, pension and other benefits. An employee can escape termination only if the Merit systems Protection Board *unanimously* agrees, an often impossible and wholly arbitrary decision. 5 U.S.C. § 7326. Since few, if any, federal employees are able or willing to abandon a long-standing civil service career for a speculative run for Congress, particularly as a third party candidate such as Merle, the Hatch Act's prohibition amounts to an effective barrier to the ballot that imposes a constructive *fourth* qualification of non-federal employment; this barrier is as effective as if it were an outright prohibition. While employees remain technically free to run for Congress (or any elective office), they must pay the price of nearly certain loss of employment, a price for candidacy sufficiently high for virtually all employees as to amount to an effective prohibition on candidacies.

The district court concluded that because the Hatch Act does not actually prohibit candidacies it cannot be deemed to impose a fourth qualification to election to Congress since employees remain free to run (even though at the risk of nearly certain termination). The district court reasoned that even if they are terminated, the employee may still remain on the ballot under state law and continue to seek election.

The district court was unpersuaded that the likelihood of termination was a sufficiently burdensome loss as to amount to a constructive or effective barrier. One could argue that the district court blinded itself to the patently obvious economic coercion against the exercise of political rights imposed by the Hatch Act.

The court of appeals expanded this reasoning, adding the dictum that the Hatch Act's prohibition is "not even as draconian as some 'resign to run' laws" since Merle was not required by law to abandon his employment but could "wait for the Government to meet its burden of responding to his candidacy" with a punitive proceeding. Pet. App. 8a. This reasoning does not consider that under the Hatch Act dismissal is a *mandatory* sanction that must follow any candidacy for partisan office by a federal employee, unless the employee should be fortunate enough to gain a "unanimous" reprieve from the Merit Board. 5 U.S.C. § 7326.[3] Thus, the Act is crafted in such a way as to create a presumption of termination that can only be overcome by a *unanimous* reprieve.

For the courts below to suggest that the prohibition is not the equivalent of an outright ban is to ignore the highly punitive and unbalanced administrative proceeding mandated under the Act. *Id.* For the employee under the Hatch Act, the Merit Board amounts to a latter-day Star Chamber with the presumption of termination hanging heavy and ineradicable over the proceeding.

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3. Since Merle abandoned his candidacy upon the dismissal of his application to the district court, he faced no punitive proceeding.

2. Fear of dismissal represents a true economic loss, a potentially destructive injury to the employee's family. This coercion is the very mechanism chosen by the legislative drafters to effectively prevent federal workers from seeking elective office. The framers of the Hatch Act would not have included a sanction of dismissal if they did not believe it would amount to an effective barrier to candidacies by federal employees. At present, none of the nearly five million federal employees may run for any partisan elective office[4] and certainly not for the federal elective office at issue here. Merle, like many federal employees, has worked for many years for the government and would lose a valuable civil service career and pension benefits if he were to seek election to Congress in violation of the Hatch Act. Effectively, the Hatch Act imposes the very type of barrier that would amount to a "qualification" for election in that it imposes a threshold penalty unacceptable to nearly any federal worker, much less one who seeks the purely ideological gesture of running for a third party with virtually no chance of election.

3. Both the district court and the Third Circuit were barred from considering the first amendment aspects of Merle's claim due to this Court's controlling decisions in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) which upheld the Act against broad first amendment challenges by federal employees seeking election to state and party office. Notwithstanding these controlling decisions, Merle asserts that his first amendment rights of free speech and association

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4. Except for those who live in certain counties of Maryland and Virginia who may run for local municipal office under a statutory exemption that is not applicable to the instant case. 5 U.S.C. § 7325.

are impugned by the Hatch Act's prohibition on seeking partisan elective office. The most recent of the Court's controlling decisions, *Letter Carriers*, was decided 30 years ago, which is the last time the Court examined the first amendment implications of the Hatch Act. Since *Letter Carriers*, the political rights of governmental employees have been expanded in several decisions of this Court, notably *Republican Party v. White*, 536 U.S. 765 (2002), and *Connick v. Myers*, 461 U.S. 138 (1983), and the Court has notably expanded free speech rights in other contexts.

Both *Republican Party* and *Connick* expanded the protection for political speech and conduct accorded governmental employees in a manner that calls for review of the expansive holdings in *United Public Workers* and *Letter Carriers*. In view of the improved juridical climate for governmental workers' political and speech rights fostered by this Court's later decisions, it is appropriate for the Court to revisit the first amendment holdings of *United Public Workers* and *Letter Carriers*. As few federal workers have the fortitude to risk even the court challenge to the Hatch Act, this case presents a rare opportunity for the Court to revisit these issues.

Republican Party declared unconstitutional a Minnesota statute that barred candidates from judicial office from making statements of their positions on substantive legal issues. In declaring these restrictions unconstitutional, the Court held that judges or judicial candidates, despite their governmental association, may *not* be restrained in their right to free speech. While *Republican Party* does not go directly to the question presented here, to wit: the employee's right to seek office, *Republican Party*, by lifting restraints on the

most highly regulated of government employees — judges — plainly calls into question the validity of continued broad-based occupational debarments of federal employees.

Similarly, in *Connick v. Myers* the Court held that a state may not impose an absolute sanction of dismissal of an employee who violated a prohibition on political speech under a state law "Mini Hatch Act". *Connick* held that in place of mandatory dismissal, the state must first find that the political speech interfered with the efficient operation of the governmental department. *Connick* challenges the assumption in the federal Hatch Act that dismissal or sanction is to be automatic in response to a political candidacy or other violation.

Connick and *Republican Party* raise serious and significant questions as to the continued viability of the broad first amendment holdings of *Letter Carriers* and *United Public Workers* and it is appropriate that the Court revisit, through the instant petition, these earlier controlling decisions.

4. The Third Circuit below relied largely on the Ninth Circuit's decision in *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir. 1983), which held that a provision of the Arizona Constitution prohibiting state elected officials from retaining state office while running for other elective office (including Congress) did not impermissibly expand the Qualifications Clause. In relying upon *Joyner*, the Third Circuit pointedly omitted any reference at all to the Second Circuit's decision in *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980), which, to the contrary, recognized that a state resign-to-run requirement imposed on a judge who ran for Congress

was an additional qualification, albeit one that was constitutionally acceptable due to federalist deference to state judicial regulations. *Signorelli*, 637 F.2d at 858-59. Although upholding the statute as applied in the unique context of judges, the Second Circuit in *Signorelli* plainly recognized the resign to run requirement as an added qualification to those stipulated in the Qualifications Clause. The Third Circuit's reliance on *Joyner* to the exclusion of *Signorelli* demonstrates a split among the circuits as to whether the resign-to-run requirements or similar statutes (*i.e.*, the Hatch Act) are an added qualification to the three enumerated in the Qualifications Clause, which this Court has held are "exclusive and fixed" in the Constitution. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995).

REASONS FOR GRANTING THE PETITION

The petition should be granted for three reasons. *First*, the case concerns a question integral to the constitutional structure of the federal government never before addressed by this Court, but which has arisen on several prior occasions, namely whether the Hatch Act's ban on candidacies by federal employees impermissibly expands upon the Qualifications Clause. In its force and effect, the Hatch Act directly contravenes the well-stated policy of placing as few barriers as possible to service in the national legislature. By imposing a penalty of termination, the Act effectively renders nugatory this national policy and debars millions of American citizens from seeking election to the national legislature. Such deprivation of political liberties, without relation to the employee's job description, grade or level of service, or the absence of executive or policy making responsibilities, is diametrically contrary to the intentional plan of the framers in permitting easy entry for service in the

national legislative body. *Powell v. McCormick*, 395 U.S. 486, 541 (1969), citing 3 *Elliot's Debates* 8 ("It has ever been considered a great security to liberty that *very few should be excluded* from the right of being chosen to the legislature.") [emphasis added]; ". . . the door of [Congress] is open to merit of every description . . .", The Federalist, No. 52 at 326 (Mentor ed. 1961).

Second, the Hatch Act itself does not expressly prohibit Congressional candidacies but contains only a general prohibition on the seeking of election to partisan elective office. If congressional candidacies are to be deemed within the scope of the Act's prohibition, the Act would represent a patent alteration of the constitutional policy of minimal entry requirements to membership in Congress. As has been long-held in this Court, enactments that pose conflicts with Constitutional norms cannot be inferred "in the absence of a clear expression of Congress' intent . . ." *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). While this Court has upheld the Hatch Act on several occasions, *i.e.*, *United Public Workers* and *Letter Carriers*, those decisions concerned the Act's prohibition on election to *state* or *party* office, *not* to Congress, an inference that gives rise to a direct conflict with the Qualifications Clause and one that the courts are bound to avoid in the absence of clear congressional intent to the contrary. *Id.*

In light of the multiple times this matter has arisen in the Courts of Appeals, *i.e.*, *Joyner*, *Signorelli* and the instant matter, and the differing views taken by the circuits, it is imperative that this Court resolve the ultimate question as to the scope of the Qualifications Clause in the context of the Hatch Act and state law "mini-Hatch Acts."

Third, first amendment jurisprudence has advanced mightily in the three decades that have passed since the Court last dealt with the free speech implications of the Hatch Act in *Letter Carriers*. In the years since *Letter Carriers* was decided the Court has liberalized many of the restraints placed upon government employees' political liberties. To leave the broader free speech questions created under the Hatch Act without contemporary analysis would be to deprive the public of judicial guidance on critical and fundamental constitutional questions which, by their very nature, are deserving of this Court's contemporary review. The Court's jurisprudence since *Letter Carriers* has steadily led in the direction of more open political participation and discourse and the Hatch Act should be re-examined in light of this emerging train of constitutional thought.

I. The Decision Below Violates Fundamental American Constitutional Policy that Barriers to Entry to the National Legislature be Minimal and that the Doors to the Congress be "Open to Merit of Every Description".

The decision of the Third Circuit below (and the Ninth Circuit's decision in *Joyner*) contradicts long-standing American public policy requiring minimal entry barriers to Congress. As *Signorelli* noted, broad occupational or class-based debarments to entry to Congress are constitutionally suspect. American constitutional policy prohibits class-based restrictions on membership to the national legislature.

Unique among all eighteenth century constitutions and governments, the U.S. Constitution requires that membership in the national legislature be open to the widest possible class of candidates. The sole qualifications for membership in the

House of Representatives were to be age, citizenship and residence. As James Madison wrote in the Federalist No. 52, "under these reasonable limitations, the door of this part of the federal government is *open to merit of every description . . .*" *The Federalist*, No. 52 , *supra*. Madison, in speaking of the Qualifications Clause, would hardly state that membership in the House of Representatives is to be "open to merit of every description" if the framers had intended all employees of the national government *as a class* to be deemed ineligible to seek election to the Congress.

As this Court has noted, the framers believed fervently that "it has ever been considered a great security to liberty that *very few should be excluded* from the right of being chose to the legislature." *Powell v. McCormick*, *supra*, citing 3 *Elliot's Debates* 8 [emphasis added]. Nowhere in the Constitution, in Madison's *Notes of Debates in the Federal Conventions* or in *The Federalist Papers* is there the slightest inference that federal employees were to be barred *as a class* from eligibility to seek national elective office.

Reflecting this long-held public policy, the Second Circuit in *Signorelli* noted the distinction between the right of states to impose electoral restrictions on certain state offices "peculiarly with the essential regulatory authority of the states", *i.e.*, judges, and

> . . . restrictions upon a broad range of occupations, which, if attempted, would indirectly impose added requirements for Congressional office upon large categories of people . . .

Signorelli, 637 F.2d at 859.

Even *Joyner*, which upheld the limited Arizona "resign-to-run" law that affected only elected officials, a relatively small and discrete class, distinguished the Arizona law from one that would place "restrictions upon a broad range of occupations", which *Joyner* held "are constitutionally suspect." *Joyner*, 706 F.2d at 1530.

The Constitution itself anticipates that federal employees may decide to seek election to Congress. The Framers' concern was not that sitting employees be barred from *seeking* election but that they could not simultaneously hold federal employment *and* a seat in Congress. Art. I, Sec. 6, cl.2 expressly addresses this concern in language that supercedes the Congressional enactment in the Hatch Act:

> . . . no Person holding any office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. Constitution, Art. I, Sec. 6. cl.2.

By this language the Framers evidently anticipated that federal employees from time to time would seek election to Congress and required only that they not serve simultaneously in both branches. Rather than a policy of debarring such candidacies, the Framers chose the option of requiring federal employees to abandon their federal office before accepting their seat in the legislature. The Framers having established a constitutional mechanism that regulates such candidacies, it follows that Congress may not impose its own legislative judgment (in the form of the Hatch Act's prohibition on federal candidacies) in place of the constitutional policy.

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995), recognizes the strong constitutional policy underpinning the Qualifications Clause. In *U.S. Term Limits* this Court held that state term limits laws applied to members of Congress were an impermissible expansion of the Qualifications Clause. The Court concluded that "with respect to Congress, the Framers intended the Constitution to establish fixed qualifications," *U.S. Term Limits*, 514 U.S. at 792-93, and that

> allowing Congress to impose additional qualifications would violate that 'fundamental principle . . . that the people should choose whom they please to govern them.

Id. at 794.[5]

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5. As one commentator has observed, this Court's decision in *U.S. Term Limits* provides new impetus for a review of the Hatch Act's constitutionality with respect to the prohibition on congressional candidacies by federal employees:

> . . . the Hatch Act's restriction could constitute an effective disqualification since it forces [the employee's] resignation. If the Hatch Act were to be challenged on these grounds, it is unclear how the Supreme Court would rule. Nevertheless, the *U.S. Term Limits* decision provides greater support for a challenge than has previously been available.

Hans, "Symposium: Practitioner's Guide to the October 1994 Supreme Court term: Note: *U.S. Term Limits, Inc. v. Thornton*: State-Imposed Term Limits are Unconstitutional, But What Else Did the Court Say?", 31 Tulsa L.J. 585, 603 (1996).

With its mass debarment of millions of American citizens from seeking election to their national legislature, the Hatch Act, and the decisions below, contravene the constitutional policy that "few should be excluded", *Powell v. McCormick*, *supra*, from service in Congress and that "the people should choose whom they please to govern them." *U.S. Term Limits*, *supra*. Nothing could be further from the goal of minimal qualifications for congressional eligibility than the mass disqualification of the *entire* class of federal employees from the right to seek election to Congress.

No "broader range of occupations" exists than the Hatch Act's mass disqualification of all federal employees from the right to seek election to Congress. No greater injustice exists in our present governmental structure than this continuing derogation of the Framers' policy of encouraging minimal requirements for service in the national legislature. Yet, the Third Circuit below refused to recognize what was so readily apparent to the Second and Ninth Circuits, to wit: that "restrictions upon a broad range of occupations" and "upon large categories of people", *Signorelli*, 637 F.2d at 859, "are constitutionally suspect." *Joyner*, 706 F.2d at 1530.

This continuing ideological disruption of the basic rights of millions of American citizens requires this Court's intervention, teaching and judicial guidance.

II. A Split has Arisen Among the Three Circuits that have Considered the Qualifications Clause in the Context of the Hatch Act or State Law Prohibitions on Congressional Candidacies.

This Court's intervention is necessary to address two splits among the circuit courts of appeal.

A. The Circuits Appear to be Split as to Whether Prohibitions on the Right of Broad Classes of Citizens to Seek Elective Office are Constitutionally Suspect.

The Third Circuit has diverged from the Second and Ninth Circuits concerning the constitutionality of broad occupational debarments of eligibility to seek election to public office. In *Signorelli* and *Joyner*, as noted Section I, *supra*, the courts of appeal declared that broad occupational debarments are constitutionally suspect. *Signorelli* and *Joyner* upheld the disqualification of *narrow* classes of officials from eligibility to seek election to Congress. But both courts held that broader debarments involving "large numbers of people" or "broad ranges of occupations" would be "constitutionally suspect". *Signorelli*, 637 F.2d at 859; *Joyner*, 706 F.2d at 1530. Even while recognizing the states' authority to disqualify certain narrow classes of officials, both the Second and the Ninth Circuits refused to accept the expansion of this doctrine to large undifferentiated classes of employees. In *Signorelli*, the debarment extended only to judicial officials, and in *Joyner* the debarment extended only to state elected officials, a somewhat larger, but still narrow class when compared to a class composed of *all government employees* as in the Hatch Act.

The Third Circuit below refused to accept the distinction between the narrow classes of judges and elected officials recognized in *Signorelli* and *Joyner* and the exponentially larger classification of *all* federal workers declared ineligible under the Hatch Act. The Third Circuit expressly held that the Hatch Act "does not impermissibly add additional qualifications to those seeking to serve as United States Representatives, but is rather *a permissible regulation of the activities of federal employees*." Pet. App. 6a. [emphasis added]. By this language, the Third Circuit accepts the Hatch Act's wholesale disabling of the vast undifferentiated class of federal workers from seeking election to Congress (or any other position), thereby rejecting the position held by the other circuits which held that such large-scale debarments would be "constitutionally suspect". That the Third Circuit has diverged from the approach adopted by the Second and Ninth Circuits is evident from the Third Circuit's failure to even acknowledge the contrary case law of *Signorelli* and *Joyner* as to this point.

Thus, the Third Circuit accepts what the Second and Ninth Circuits reject: disqualification of massive numbers of governmental employees "as a permissible regulation . . ." *Id.*, while *Signorelli* and *Joyner* both hold that such broad occupational classifications are "constitutionally suspect". This Court's intervention and teaching are necessary to definitively resolve this question.

B. The Circuits are Split as to Whether the Hatch Act and Resign-to-Run Laws Comprise a "Qualification" that Impermissibly Expands the Qualifications Clause.

A second split has arisen as to whether Hatch Act-type prohibitions amount to an added "qualification" beyond those already provided under the Qualifications Clause.

The Third Circuit followed the Ninth Circuit's reasoning in *Joyner* that such prohibitions do not add an additional qualification of non-federal employment to those already stipulated in the Qualifications Clause. *Joyner* reasoned that since the employee is still free to seek election, albeit at the likely expense of his job, the Hatch Act's prohibition does not amount to an actual qualification beyond the three enumerated in the Qualifications Clause. The Third Circuit accepted this reasoning, stating

> The Act allows a citizen a choice. It does not disqualify any individual from running for public office, but rather provides for the removal or suspension . . . of any *federal employee* who is a candidate . . .

Pet. App. 8a [emphasis in original].

In contrast, the Second Circuit in *Signorelli* followed a different line of reasoning holding that a state law that forced the resignation of a judge who seeks election to Congress *does* add a qualification beyond those enumerated in the Qualifications Clause. *Signorelli* upheld the state law only as a permissible regulation of the judiciary traditionally delegated to states under federalist principles but recognized

that in other circumstances such statutes would represent an additional qualification beyond those enumerated in the Qualifications Clause. The Court in *Signorelli* stated:

> Nevertheless, it must be acknowledged that New York's regulatory scheme . . . imposes, albeit indirectly, a qualification upon Signorelli's freedom to run for Congress. In addition to being over 25, a citizen for seven years, and an inhabitant of New York, he must not be a state judge. The fact that Signorelli has it within his power, by his own choosing, this satisfy this fourth requirement does not answer his objection that the requirement is an additional qualification beyond the exclusive trio specified by the Constitution.

637 F.2d at 858-59.

Thus, the Second Circuit is plainly at odds with the reasoning employed by the Third Circuit. Indeed, the Second Circuit in *Signorelli* uses the very language raised by petitioners in the instant case: petitioner Merle argues that the Hatch Act comprises a fourth requirement that the candidate "not be a federal employee"; the court in *Signorelli* notes that the New York law creates a fourth requirement that the candidate "not be a state judge", a virtually identical conclusion.

It is readily apparent then that Second Circuit sees such occupational debarments as additional qualifications, while the Third Circuit, presented by petitioners with the same argument, finds no expansion of the Qualifications Clause. Under the doctrine of the Second Circuit, the Hatch Act prohibition would appear to be an improper expansion of

the Qualifications Clause while under the Ninth and Third Circuit holdings it would not.[6]

This Court's intervention is necessary and appropriate to resolve these divergences and to provide a consistent and uniform national policy in the application of the Qualifications Clause to the Hatch Act and analogous state laws.

III. The Courts Below Should have Followed this Court's Precedents and Construed the Hatch Act to Deem Congressional Candidacies Removed from the Act's Prohibition.

The Hatch Act is silent as to any ban on federal candidacies, and the courts below should have construed the Act as to exclude federal candidacies from the Act's general prohibition, thereby avoiding the constitutional question.

The Act, as well as its long legislative history, is silent as to the inclusion of federal elections within the ban on the seeking of "partisan elective office". The failure of Congress to make such designation speaks to the obvious and inevitable conflict between a ban on federal candidacies and the

6. To add to this judicial confusion, as noted in Section II (A), *supra*, even the Ninth Circuit, while disagreeing with the Second Circuit's reasoning that such statutes amount to an added "qualification", would still join the Second Circuit in finding such statutes "constitutionally suspect" if applied to broad classes of employees. This reasoning, joined in by both the Second and Ninth Circuits is rejected by the Third Circuit which upheld the Hatch Act's mass disqualification "*of* any *federal employee*", perhaps the largest single occupational class in the nation. With the three circuits engaged in this labyrinthine path of agreement and disagreement, it is paramount for this Court to establish a uniform national judicial policy in this field.

Qualifications Clause, under which the qualifications for federal office "are defined and fixed . . . and are unalterable by the legislature." *Powell v. McCormick*, 395 U.S. 486, 539 (1969), citing U.S. Const. Art. I, Sec. 2, cl.2, and which is absolutely silent as to occupational debarments.

A. The Decision Below Fails to Follow this Court's Rule of Construction as to Avoidance of Constitutional Conflicts in Legislation.

The court is to construe a statute so as to avoid confronting a constitutional question unless such construction is plainly contrary to the intent of Congress. *National Labor Relations Board v. Catholic Bishop*, 440 U.S. at 543-44. This policy reflects the judicial concern that constitutional issues "not be needlessly confronted." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988). The Court is bound to avoid even the raising of a constitutional question so long as "such a reading is not plainly contrary to the intent of Congress. *United States v. X-Citement Video*, 513 U.S. 64, 78 (1994). "[T]his Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *International Association of Machinists v. Street*, 367 U.S. 740, 749-50 (1961).

The Hatch Act is silent as to any ban on federal candidacies and the court below should not have construed the Act to include such a ban in the absence of a clear expression of Congress' intent. *Catholic Bishop*, *supra*. The three qualifications for service in Congress — age, citizenship and residency in the state where elected — "are defined and fixed [in the Constitution] . . . and are

unalterable by the legislature." *Powell*, 393 U.S. at 539. "With respect to Congress, the Framers intended the Constitution to establish fixed qualifications." *U.S. Term Limits*, 514 U.S. at 792-93. Any Congressional enactment imposing a requirement of non-federal employment for Congressional candidates would obviously give rise to a serious constitutional issue as to whether the enactment impermissibly expands upon the Qualifications Clause.

Such a construction would have been consistent with this Court's long-standing practice of construing an enactment to avoid confronting a constitutional conflict. In *Catholic Bishops*, *supra*, this Court was faced with a virtually identical question: should the National Labor Relations Act be deemed to extend to religious institutions in the absence of an express inclusion of religious entities by Congress? Though that statute was drafted in terms as broad as the Hatch Act, this Court concluded in *Catholic Bishop* that the statute could *not* be deemed to extend to religious institutions in the absence of a clear expression of Congress' intent to do so. 440 U.S. at 507. In the absence of a clear Congressional designation that brought religious institutions within the scope of the law, the Court would not deem the enactment to extend to a field, *i.e.* regulation of religious institutions, that would necessarily implicate a constitutional question. *Id.*

The court of appeals below should have followed this rule of construction but did not. Just as in *Catholic Bishop*, Congress' failure to include an express reference to federal election campaigns in the Hatch Act's broad prohibition should have admitted of a construction that avoided the constitutional question. But the court of appeals did not follow this rule of construction, instead deeming the Hatch Act's generalized prohibition on campaigns for "partisan

political office" to automatically incorporate federal elective office, Pet. App. 6a, despite any statement to such effect in the statute. Such analysis is directly at odds with this Court's rule of construction as applied in *Catholic Bishops*, *supra*.

By failing to follow this Court's jurisprudence in *Catholic Bishop* the court below needlessly forced the resolution of a constitutional question, to wit: whether the Hatch Act's ban on seeking elective office impermissibly expands the Qualifications Clause. Since the statute is silent as to the inclusion of federal candidacies within the Act's prohibition and there is no substantive reference to federal candidacies in the legislative history, the court of appeals should have followed this Court's approach in *Catholic Bishop* and held that the Hatch Act does not extend to federal elections, thereby avoiding the constitutional question under the Qualifications Clause.

B. The Decision Below Upholds a Usurpation by Congress of Powers Not Delegated to it by the Constitution.

If allowed to stand, the decision below would set a judicial policy of accepting legislative usurpation of constitutionally-limited powers and would be a rejection of this Court's jurisprudence requiring that enactments be interpreted so as to the appearance of such usurpation. *Edward J. DeBartolo Corp. v. Florida Gold Coast Building and Construction Trade*, 485 U.S. at 575.

At no time, despite amendments in 1939, 1940 and 1993, has Congress included a statutory reference to candidacies for election to federal office in the Hatch Act's general prohibition on partisan election activities. The failure of

Congress to do so is understandable in light of the very plain commitment of the Constitution to minimal entry requirements for service in the national legislature. With multiple missed opportunities to amend the Act to include a direct inclusion of federal candidacies among the prohibited "partisan" activities, Congress has eloquently demonstrated its own ambivalence as to the proprietary of such a prohibition. In light of the Constitution's policy of minimal entry requirements for service in Congress, the legislative drafters' repeated failure to include an express reference to a prohibition on federal candidacies must be seen as a lack of demonstrable intent to create a challenge to the Constitutional policy. In the absence of such intent "the courts will not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden to it." *Edward J. DeBartolo, supra.*

Few legislative policies have greater potential for usurpation of forbidden powers than the imposition of extra-constitutional rules for eligibility to serve in the national legislature, one of the fundamental structural elements of the constitutional system. Congress' failure to include such a designation is reflective of the drafters' recognition of the need to avoid a legislative usurpation of constitutionally limited powers. *Edward J. DeBartolo, supra.* As set forth in section II, *supra*, the imposition of minimal qualifications for membership in the national legislature is a fundamental constitutional policy and one that cannot be lightly assumed to be usurped or altered in the absence of express legislative intent. *Id.* The Third Circuit's decision below is contrary to this jurisprudence.

IV. Contemporary First Amendment Jurisprudence Makes it Appropriate and Necessary to Revisit the Constitutionality of the Hatch Act's Prohibition on Political Candidacies.

Three decades have passed since this Court last reviewed the first amendment implications of the Hatch Act in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) where the Court held that the Hatch Act's prohibition on candidacies was within the permissible scope of regulation of federal employees and did not violate the first amendment. Since *Letter Carriers*, several decisions of this Court have liberalized the rules restraining political rights of governmental or quasi-governmental employees.

This Court's more recent decisions suggest strongly that Hatch Act-type restraints are no longer constitutionally acceptable but must be narrowly focused to pass constitutional muster. *Republican Party v. White*, 536 U.S. at 774. Both the Second and Ninth Circuits in *Signorelli* and *Joyner* appear to be in accord with this trend as both recognized that broad-based occupational restrictions on political liberties would be constitutionally suspect. *Signorelli*, 637 F.2d at 859; *Joyner*, 706 F.2d at 1530. The decision below goes squarely against this developing jurisprudence.

Beginning with *Bates v. Arizona State Bar*, 433 U.S. 350 (1977), decided four years after *Letter Carriers*, the Court began to narrow the conditions under which governments may regulate the free speech rights of large occupational classes. *Bates* is significant in that it recognized the unconstitutionality of presumptive government restraint of

the free speech rights of lawyers, a large quasi-governmental class of citizens. 433 U.S. at 383. *Bates* struck down the presumption that government may restrain the speech rights *a priori* of a broad occupational class that previously had been thought subject to presumptive state regulation. *Accord*, *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976),

In *Connick v. Myers*, 461 U.S. 138 (1983), the Court expressly retreated from the harsh, overwhelming presumption of Hatch Act-type governmental regulations. In *Connick* the court, applying a state Hatch Act analogue, held that government may not punish the exercise of political speech with presumptive termination in the absence of proof that the speech endangered the efficient operation of the governmental department. *Connick*, 461 U.S at 150-54. *Connick* thereby undermines the earlier presumption of *Letter Carriers* that government, through the Hatch Act or similar laws, may presumptively punish by termination partisan political activity.

In *Republican Party v. White*, *supra*, the Court declared Minnesota regulations prohibiting the expression of judicial candidates' political and legal views to be unconstitutionally overbroad. 536 U.S. at 788. In so ruling, the Court applied strict scrutiny and overbreadth analysis to the question of whether Minnesota's judicial regulation violated the first amendment rights of judges and judicial candidates. 536 U.S. at 774-75. *Republican Party* reversed a decades long practice of placing the first amendment rights of judges and judicial candidates under a strict legal disability. 536 U.S. at 785.

These cases demonstrate that a change in the Court's approach to the political and first amendment rights of government employees has emerged in the thirty years since *Letter Carriers* was decided. Both *Connick* and *Republican Party* directly contradict the long-held convention that government may presumptively punish its employees for exercising first amendment rights. Under *Republican Party v. White*, such statutes are now subject to overbreadth analysis, not merely the rational basis inquiry to which the Court's earlier jurisprudence in *Letter Carriers* subjected the Hatch Act.

The Hatch Act's prohibitions, which make no distinction between different grades of federal employees, whether they have executive or policymaking responsibilities, and which does not even permit the employee to take a leave of absence during the election campaign, are undeniably overbroad and could not ordinarily sustain overbreadth analysis. Indeed, if the Court is now willing to lift such burdens from judicial employees, *i.e.*, *Republican Party*, *supra*, traditionally the most highly regulated class of government employees, then the rights of federal employees as a class must be reviewed to determine the scope of protection available to them under the Court's emerging first amendment doctrine.

First amendment overbreadth analysis having now been directly applied to such cases, this Court should revisit the Hatch Act and its earlier holding in *Letter Carriers* to determine what breadth of protection of political liberties must be made available to governmental employees.

The rights of five million Americans hang in the balance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE I. AFRAN
LAW OFFICE OF BRUCE I. AFRAN
Attorney for Petitioners
10 Braeburn Drive
Princeton, NJ 08540
(609) 924-2075

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED SEPTEMBER 30, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3531

ROGER MERLE; GREEN PARTY
STATE COMMITTEE, INC.,

Appellants,

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 02-cv-03469)
District Judge: Honorable Joseph E. Irenas

Submitted Under Third Circuit LAR 34.1(a)
June 27, 2003

Before: SLOVITER, AMBRO, *Circuit Judges*,
and TUCKER,* *District Judge.*

(Filed: September 30, 2003)

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* Honorable Petrese B Tucker, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

OPINION

AMBRO, *Circuit Judge*

Roger Merle, an employee of the United States Postal Service, wishes to run for Congress and retain his position with the Postal Service. The District Court concluded that the Hatch Act bars him from doing so. We agree and thus affirm.

I. Facts and Procedural History

Merle is a rural letter carrier for the Postal Service in Bridgeton, New Jersey. In June 2002, he filed nominating petitions with the New Jersey Division of Elections seeking qualification as a candidate for election to the United States House of Representatives from New Jersey's Second Congressional District in the November 2002 election. He wished to campaign as a candidate for the Green Party. A provision of the Hatch Act, 5 U.S.C. § 7323(a)(3), prohibits candidacies by federal employees for any "partisan political office" and has been applied to Postal Service employees. *Kane v. MSPB*, 210 F.3d 1379, 1381 (Fed. Cir. 2000). As a result, Merle feared that he would be terminated under § 7323(a)(3), or face other substantive penalties if he campaigned for office.

Merle and the Green Party State Committee filed suit to obtain a declaratory judgment that he could not lawfully be removed or suspended for running for election as a United States Representative because § 7323(a)(3) is unconstitutional as applied to congressional candidacies by

federal employees. The United States filed a motion to dismiss, which was granted by the District Court. This appeal followed.

II. Discussion

We have jurisdiction over this appeal under 28 U.S.C. § 1291. We review an order granting a motion to dismiss for failure to state a claim *de novo*. *Beidleman v. Stroh Brewery Co.*, 182 F.3d 225, 229 (3d Cir. 1999).

A. Mootness

We lack jurisdiction when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The Government argues that this appeal has been mooted by the occurrence of the 2002 election and the filling of the Congressional office for which Merle wished to be a candidate. We reject this contention. This controversy, like most election cases, fits squarely within the "capable of repetition yet evading review" exception to the mootness doctrine. *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 (1996) "Like other cases challenging electoral practices . . . [,] this controversy is not moot because it is 'capable of repetition, yet evading review.'" (citing *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969))).

Under the "capable of repetition" exception, a court may exercise its jurisdiction and consider the merits of a case

that would otherwise be deemed moot when "(1) the challenged action is, in its duration, too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (citation and internal modifications omitted). The Government does not contest with much vigor that, as the duration of a campaign for the House of Representatives necessarily cannot exceed two years (the time between elections), the life expectancy of Merle's claim is too short to be fully litigated prior to cessation or expiration.

The Government does contest, however, that there is a "reasonable expectation that the same complaining party will be subject to the same action again." It argues that Merle has not alleged that he intends to run for election to the House of Representatives in 2004 and that the Green Party has not alleged that it wishes to nominate a candidate that would be subject to the Hatch Act. We disagree with the Government's assumption that such an allegation would be necessary. We think it reasonable to expect that Merle will wish to run for election to the House of Representatives either in 2004 or at some future date. *Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991) ("Respondent has run for office before and may well do so again. The likelihood that the Union's rule would again present an obstacle to a preconvention mailing by respondent makes this controversy sufficiently capable of repetition to preserve our jurisdiction."); *see also Norman v. Reed*, 502 U.S. 279, 288 (1992) (finding no mootness in case challenging candidate eligibility because "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to

identical time constraints if we should fail to resolve the constitutional issues" presented in case). And because the Hatch Act remains binding law, any future candidacy of Merle will be similarly affected by his employment with the federal government. *Morse*, 517 U.S. at 235 (finding that expectation of repetition is reasonable in case challenging convention delegate fees because "the Party has not disavowed the practice of imposing a delegate filing fee for its nominating convention").

Even if we were to require some expression of intent, Merle has provided one. As the Government itself admits, Merle contends in his brief that he "and other governmental employees will be subject to the continuing stricture of the Hatch Act in other federal elections." The Government dismisses this as a truism that says nothing about Merle's plans. We disagree. Merle will only be affected by the Hatch Act in future elections if he is a candidate for partisan office in those elections—if he is a voter, a volunteer, or a bystander, the Hatch Act will not apply to him. By stating that he will be subject to the Hatch Act in future elections, we perceive Merle is stating that he intends to run for partisan office in future elections.

For these reasons, we conclude that Merle's claim is not moot because it fits within the "capable of repetition yet evading review" exception.

B. Merits

The Qualifications Clause provides that "[n]o person shall be a Representative who shall not have attained the Age of twenty five Years and have been seven Years a citizen

of the United States and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." U.S. Const., article I, § 2, cl. 2. This list of qualifications is exclusive and fixed. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995) ("[N]either Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution."). Merle argues that the Hatch Act, as applied to those seeking candidacy as United States Representatives, impermissibly imposes the additional qualification of non-federal employment. As a result, he argues that the Hatch Act can, and should, be construed such that the office of United States Representative is not a "partisan political office" under the Hatch Act.

We disagree. By the plain terms of the Hatch Act, the office of United States Representative is a partisan political office. Further, the Act does not impermissibly add additional qualifications to those seeking to serve as United States Representatives, but is rather a permissible regulation of the activities of federal employees. As a result, we affirm the District Court's order dismissing Merle's complaint.

The term "partisan political office" contained in the Hatch Act cannot be construed as inapplicable to candidates for the office of United States Representative. Such a construction is at odds both with the definition of the term as contained within the Hatch Act and with congressional intent. The Hatch Act defines "partisan political office" to mean "any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding

election at which Presidential electors were selected." 5 U.S.C. § 7322(2). Candidates for the office of United States Representative are routinely nominated and elected as representatives of the Democratic and Republican parties, whose candidates for Presidential elector received votes in the last preceding Presidential election.

It is true, as Merle notes, that the statutory language "makes no reference to federal elective offices such as U.S. Representative." But we do not find this dispositive. In defining the term "partisan political office," Congress could have explicitly listed those offices it deemed partisan political offices. Or it could have, as it did, provide a definition of the types of offices it deemed to be partisan political offices, without listing any particular offices that fall within that definition. Congress chose the latter route. As a result, the office of United States Representative need not be specifically enumerated in the statute for it to be included within it. Thus we hold that the office of United States Representative is a "partisan political office" as that term is defined in the Hatch Act.

Our holding, contrary to Merle's assertions, is supported by the legislative history of the Hatch Act. Merle claims that the Act's legislative history contains no evidence that it was intended to reach to federal elective offices. But the Supreme Court has determined the contrary. Congress, it concluded, intended that "the general proscription against partisan activities" include prohibitions on "candidacy for nomination or for the election to any National, State, county or municipal office." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 572 n.18 (1973) (quoting 86 Cong.

Rec. 2943 (March 15, 1940)). A United States Representative is a national office.

Nor are we persuaded that the Hatch Act is unconstitutional. The Act allows a citizen a choice. It does not disqualify any individual from running for public office, but rather provides for the removal or suspension from public employment of any *federal employee* who is a candidate in a partisan election. This distinction, between laws that bar potential candidates from running for elected office and laws that bar potential candidates from continuing to work for state or federal governments (so-called "resign to run" laws), is a key distinction for the purpose of the Qualifications Clause. The former "imposes additional qualifications on candidates and therefore violates the Qualifications Clause, while the latter category is constitutionally acceptable since it merely bars state officeholders from remaining in their positions should they choose to run for federal office." *Joyner v. Mofford*, 706 F.2d 1523, 1528 (9th Cir. 1983) (sustaining provision of Arizona constitution forbidding state officials from retaining office while running for elected federal positions against Qualifications Clause challenge). A "resign to run" law may force Merle to choose between remaining as an employee of the federal government and running for elected office, but forcing Merle to make that decision does not constitute an additional qualification for the office of United States Representative.[1] *See National Association of Letter Carriers*,

1. Indeed, as the District Court noted, the Hatch Act is not even as draconian as some "resign to run" laws. Merle may retain his position and wait for the Government to meet its burden of responding to his candidacy with a sanction of removal or suspension, something that might not happen.

413 U.S. at 556 (1973) (upholding constitutionality of Hatch Act against First Amendment challenge because neither the First Amendment "nor any other provision of the Constitution" prohibits Congress from regulating the conduct of federal employees by prohibiting "becoming a partisan candidate for, or campaigning for, an elective public office"); *see also United States Term Limits*, 514 U.S. at 835 n.48 (noting validity of resign-to-run statutes that "place no obstacle between a candidate and the ballot or his nomination or his election").

III. Conclusion

For these reasons, we affirm the judgment of the District Court.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 5, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 02-3469 (JEI)

ROGER MERLE and GREEN PARTY STATE COMMITTEE, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

HONORABLE JOSEPH E. IRENAS

OPINION

IRENAS, District Judge:

Plaintiff Roger Merle, a letter carrier with the United States Postal Service, seeks to run, as a Green Party candidate, for the office of United States Representative. However, as a federal employee, he is prohibited by the terms of the Hatch Act, 5 U.S.C. § 7323(a)(3), *et seq.*, from seeking elective office in a partisan election. Accordingly, Merle has filed this action seeking a declaration that the Hatch Act is unconstitutional, as applied, as contrary to the Qualifications Clause of Article I of the United States Constitution.

Appendix B

Article I, § 2, cl. 2 of the Constitution provides that "No Person shall be a Representative who shall not have attained the Age of twenty five Years, and have been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." These qualifications have long been recognized as exclusive, and may not be modified by either Congress or the States. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995) ("[N]either Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution."); *Powell v. McCormack*, 395 U.S. 486 (1969). In this case, Plaintiffs contend that the Hatch Act impermissibly adds to the qualifications for the office of Representative by mandating that, in addition to the criteria set forth by the Constitution, Representatives must meet the additional requirement that they not be federal employees at the time of their election. The Court, however, disagrees.

In arguing that the Hatch Act is constitutional as applied to Merle, the United States contends that the Act is merely a permissible regulation of federal employee activities. Specifically, the government notes that the Act does not disqualify any individual from running for public office, but instead provides for the removal or suspension from public employment of any employee who is a candidate in a partisan election. *See* 5 U.S.C. § 7326. As the government correctly points out, this distinction, between laws that penalize a candidate as an employee, and those that prohibit an individual from participation in an election, has been explicitly countenanced by a number of courts considering challenges under the Qualifications Clause.

Appendix B

The Hatch Act's prohibition on political activities by federal employees has been upheld by the Supreme Court on a number of grounds, although the Qualifications Clause is not one of them. In *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, (1973), for instance, the Court stated the broad proposition that neither the First Amendment "nor any other provision of the Constitution" prohibits Congress from regulating the conduct of federal employees by prohibiting such activities as organizing a political party, participating in fund-raising activities or "becoming a partisan candidate for, or campaigning for, an elective public office." *Id.* at 556.

It is this power of Congress, and the States, to regulate the conduct of their employees that has been the consistent basis for sustaining so-called "resign-to-run" statutes against constitutional challenge. In *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir. 1983), the Ninth Circuit sustained, against a Qualifications Clause challenge, a provision of the Arizona Constitution forbidding state officials from remaining in office while running for elected federal positions. *Id.* at 1528. In so holding, the court noted that "the courts considering challenges to state laws relying on the Qualifications Clause have distinguished between state provisions which bar a potential candidate from running for federal office, and those which merely regulate the conduct of state officeholders. The former category of laws imposes additional qualifications on candidates and therefore violates the Qualifications Clause, while the latter category is constitutionally acceptable since it merely bars state officeholders from remaining in their positions should they choose to run for federal office." *Id.*

The validity of this distinction was reaffirmed by the Supreme Court, in *U.S. Term Limits*, where the Court, in striking down Arkansas' term limits scheme, noted the validity of resign-to-run statutes which "place no obstacle between a candidate and the ballot or his nomination or his election." 514 U.S. at 835 n.48. The Hatch Act, as applied to Plaintiff, falls squarely within this category of permissible regulations, as it does not prevent his participation as a candidate for the office of Representative, but instead constitutes a valid attempt on the part of Congress to insulate public employees from partisan political influence. *See also*, *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980) (upholding, against Qualifications Clause challenge, a New York law requiring that judges resign before running for federal office); *Thorsted v. Gregoire*, 841 F.Supp. 1068, 1081-82 (W.D.Wash. 1994) (distinguishing resign-to-run cases from law establishing term limits as condition for ballot access). Indeed, Plaintiff need not even resign from his position in order to appear on the ballot, as the burden is upon the government to respond to his candidacy with a sanction of removal or suspension. Thus, while the Hatch Act will force Merle to choose between remaining in his position as a postal carrier and his desire to seek elective office, the need for this decision does not constitute an additional qualification for the office of Representative and, consequently, the Act does not run afoul of the Constitution.[1]

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1. Plaintiffs also assert a challenge to the Hatch Act under the speech and association clauses of the First Amendment. However, as the government points out, the validity of the Act under the First Amendment was already sustained by the Supreme Court in *National Association of Letter Carriers* and *United Public Workers v. Mitchell*, 330 U.S. 75 (147).

Appendix B

Accordingly, Plaintiffs' motion for emergent declaratory relief will be denied, while Defendant's motion to dismiss will be granted.

Date: September 5, 2002

s/ Joseph E. Irenas
Joseph E. Irenas, U.S.D.J.

APPENDIX C — STATUTE INVOLVED

5 U.S.C. § 7323

§ 7323. Political activity authorized; prohibitions

(a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not—

* * *

(3) run for the nomination or as a candidate for election to a partisan political office;

* * * *